

1 opening statement. Some of them you'll see
2 are already in evidence. So those we don't
3 have to worry about.

4 JUDGE: Yes. Okay.

5 MR. CARROLL: The demonstratives
6 that are in here I'm only offering for the
7 opening at this point. We'll probably ask
8 some of the later witnesses about them.

9 JUDGE: All right. That's what
10 I'm -- I mean I'm treating these as either in
11 the record by virtue that they've been
12 accepted or not in the record. But
13 nonetheless these broader rules of evidence
14 apply here because you're making an argument.

15 MR. CARROLL: Yes. Correct. And
16 that's what I'm arguing for. I have another
17 copy. Would you like a third?

18 (No verbal response.)

19 So, Your Honor, very quickly. I
20 thought it might be useful for Your Honor to
21 have a time line in this case. And some of
22 this we've spoken about already. So you kinda

1 first have -- You should have a flip out. You
2 can fold over the bottom of that page. It
3 actually flips open. There we are.

4 And I've just put together a time
5 line and the red years you'll see 1995 when
6 Golf Channel launches. Comcast percentage
7 ownership is listed there. Then OLN launches
8 in July. That later gets renamed Versus. But
9 that is Versus, OLN.

10 And then you'll see that in 1997
11 each of those channels has broad distribution.
12 And you'll see all those red years are years
13 before Tennis Channel launches. That's that
14 so-called date issue. This is all happening
15 before Tennis Channel is there to even be
16 considered as somebody to be discriminated
17 against.

18 JUDGE: So all that is in red --

19 MR. CARROLL: Yes.

20 JUDGE: -- is pre Tennis Channel.

21 MR. CARROLL: Exactly right.

22 Tennis Channel starts in May of 2003 and

1 you'll see the first deal they do is with Time
2 Warner and it's on sports tier. And then they
3 do a deal with Cox and it's on a sports and
4 information tier.

5 In 2004 -- you see this from a
6 document later today -- they have a business
7 strategy in which they're targeting at that
8 time sports tiers. Consistent with that, Your
9 Honor, in March of 2005 we sign a contract
10 with them that allows us to put them on a
11 sports tier.

12 JUDGE: Now is there a -- Let me -
13 - Sports tier, is there a generic for that?
14 That's always going to be the tier which will
15 cost a little bit more, but reaches fewer
16 people.

17 MR. CARROLL: Exactly right.

18 JUDGE: Would you agree with that,
19 Mr. Phillips?

20 MR. PHILLIPS: Your Honor, there
21 are sports tiers and there are sports tiers.

22 JUDGE: Yes.

1 MR. PHILLIPS: Cox which Mr.
2 Carroll mentions here on his chart has a
3 sports tier that reaches like I think one-
4 third of its subscribers. But it's really a
5 general entertainment tier and it has a lot of
6 different networks on it and not just sports.

7 It calls it a sports tier. So I
8 guess if you wanted to go by just what its
9 title is you could say that.

10 But the question that you've
11 really got to look at, Your Honor --

12 MR. CARROLL: I am arguing --

13 JUDGE: He's answering my
14 question. Yes.

15 MR. CARROLL: I'm sorry.

16 MR. PHILLIPS: Okay.

17 JUDGE: I'm trying to keep you as
18 colleagues now in everything.

19 MR. PHILLIPS: Yes. We've been
20 together a long time.

21 MR. CARROLL: We have.

22 JUDGE: Congratulations.

1 (Laughter.)

2 MR. CARROLL: I have -- If you'll
3 bear with me for a second, we're going to get
4 to a chart that gives you the exact to the
5 decimal point percentages of distribution for
6 each of these sport tiers. But each of them
7 is a tier that as Your Honor described it you
8 pay a little bit extra money for, \$5 to \$7
9 typically a month. And it is not as widely
10 distributed as the other tiers that are
11 offered by the distributor.

12 2005 we sign a contract with
13 Tennis Channel and it permits us to put them
14 on a sports tier. April 2005 Tennis Channel
15 hires a new CEO, Ken Solomon, and he will be
16 the first witness here. He makes enormous
17 changes, takes a very different view of the
18 direction the business should be going in
19 including that sports tier is not where they
20 want to be and including they want to do
21 equity for carriage in order to try to find
22 distribution and some other things.

1 I'll leave it at that for now.

2 These are quotes from a document and I'll wait
3 for the witness since we're in a public
4 session. But Your Honor can see them in a
5 document.

6 JUDGE: Now April 2005 Mr. Solomon
7 joins the company.

8 MR. CARROLL: He does.

9 JUDGE: Okay.

10 MR. CARROLL: He replaces the CEO
11 who had been there when we signed our
12 contract. They changed management and they
13 changed direction of Tennis Channel
14 enormously.

15 And following that change in
16 direction you'll see they start making equity
17 for carriage offers to Dish and to DirecTV in
18 September and October of 2005 on the time
19 line.

20 And over time Dish comes first in
21 February of 2006. They sign one up. And in
22 March 2007 the following year DirecTV finally

1 signs one up. All this time we're continuing
2 to carry them under our contract on the sports
3 tier.

4 You'll see on the time line July
5 2006 we do our analysis of that MFN offer I
6 told you about, that cost benefit. That's at
7 the top in about the middle of the time line.

8 JUDGE: I see it.

9 MR. CARROLL: There that one is.
10 And then in July 2007 there's the other one.
11 That's at the bottom about two-thirds of the
12 way through. You'll see the arrow for that
13 one. It's where we do the cost benefit
14 analysis on the DirectTV.

15 What's interesting is that all
16 this time there are some MVPDs, Your Honor,
17 who still are not carrying them at all. So
18 when we get to May 2009 is when the last offer
19 is made to us. You'll see it in the 2009
20 entry over near the far right.

21 JUDGE: I see it.

22 MR. CARROLL: That's the offer on

1 which they're suing here in this case. You'll
2 see in the end of 2007 Time Warner was still
3 declining offers to increase distribution on
4 its network. Still carrying them on its
5 sports tier from the very beginning.

6 And you'll see in August 2009
7 Cablevision is still refusing greater carriage
8 and, in fact, is carrying them on the sports
9 tier. And, in fact, Your Honor, in May 2009
10 when they make the offer AT&T is refusing to
11 carry them at all also. They have zero
12 distribution from AT&T.

13 JUDGE: Is this on your chart?

14 MR. CARROLL: Now let me take you
15 to the chart. The next chart under B, have
16 you turned there already or are you still on
17 the time line? If you go to B.

18 JUDGE: I'm fascinated with your
19 time line. Okay.

20 MR. CARROLL: Time lines are
21 helpful to me. They help me organize the
22 case. Before we flip from the time line, I'll

1 just give you the last date I put on it. It's
2 interesting.

3

4

5

JUDGE:

6

7

MR. CARROLL: Right.

8

JUDGE: That's coming up.

9

MR. CARROLL: That's coming up.

10 It hasn't happened yet. So we don't know what
11 that will be.

12

13

14

15

If you turn to the next tab, Your Honor, Tab B, I put together -- Remember I told you we had decimal calculations for the distribution.

16

JUDGE: Yes, you did.

17

18

19

20

21

22

MR. CARROLL: Here they are for the years 2009 and 2010. 2009 is the year that they made the offer to us that they're suing on. So I gave you 2009. We only had it as of September because that's the way the information was produced in the case.

1 But I think these numbers are
2 probably not much different at the May date
3 when the offer is made with one exception.
4 Cablevision distributes them a little later in
5 the year. They put them on the sports tier.
6 Do you see that percentage figure?

7 JUDGE: Bring me down. Where are
8 you?

9 MR. CARROLL: On the top chart,
10 Your Honor, for 2009.

11 JUDGE: Yes.

12 MR. CARROLL: The next to the last
13 entry for Cablevision.

14 JUDGE: Got it.

15 MR. CARROLL: You'll see that -- I
16 won't reveal what the carriage percent is in
17 September.

18 JUDGE: I see.

19 MR. CARROLL: But you'll see as of
20 May it's zero. That's because they had no
21 carriage with them as of that date. And the
22 same for AT&T.

1 We roll it forward to 2010 just so
2 you could get -- Because we have the
3 information, a more updated version of this in
4 the year following the offer that they're
5 suing us on. And all I'll say for now --
6 we'll get into the figures later -- is that
7 some of them have moved up, but some have
8 moved down.

9 And the last point I want to make
10 about this is that and you've seen this before
11 I know from some of the other cases that
12 you've already had, Your Honor, and the FCC I
13 think commented on this in its decision in
14 MASN, the independent decisions by other MVPDs
15 is quite relevant to the discrimination
16 question. Because if you have other MVPDs,
17 other cable companies, who are doing something
18 similar to what Comcast is doing or maybe even
19 aren't carrying it at all. And we are
20 carrying them, that is strong evidence to
21 suggest we're not discriminating because other
22 people are doing something that's either like

1 what we're doing or in some cases even worse
2 for Tennis aren't carrying them at all.

3 And when you look at this chart
4 you can see that the last column of the chart
5 I've noted the equity for carriage. And I've
6 noted that because there are two MVPDs on this
7 who we think stand out as quite different and
8 they are Dish and DirecTV because those were
9 not straight carriage deals. Those were deals
10 they got by offering equity, by offering stock
11 in themselves.

12 JUDGE: I understand.

13 MR. CARROLL: Behind Tab C --

14 JUDGE: Now do you think -- Is
15 there ever a reason that perhaps there might
16 be some carriers, MVPDs, that the Tennis
17 Channel doesn't like? For some reason or
18 another they just don't want to deal with
19 them? They don't approach them. They don't
20 carry about them or whatever.

21 MR. CARROLL: That's an
22 interesting question. I think the answer to

1 that -- but we'll hear from Mr. Solomon and
2 maybe I'll ask him that -- is they want as
3 much distribution as they can get. But
4 sometimes they have refused deals after Mr.
5 Solomon came on board where the cable company
6 was willing to do a sports tier because they
7 changed their strategy. And they said, "No,
8 we're not doing sport tier deals anymore."

9 So part of what happened in years
10 after 2005 is Tennis Channel changed its
11 strategy and actually started saying, "We
12 won't let you do the distribution on a sports
13 tier." And they held out for different deals
14 or they offered equity. Different
15 circumstances I would say.

16 Behind Tab C, Your Honor, and
17 we're not going to go through any of these
18 documents now, but I put because I think it
19 will be a handy collection for Your Honor to
20 have in this case. Remember I told you we had
21 contemporaneous documentation of all of the
22 cost benefit analyses that we had done. Here

1 it all is.

2 JUDGE: Here it all is.

3 MR. CARROLL: 2006, 2007 and 2009.

4 You'll see the slide charts I told you about
5 in '06 and '07. You'll see the handwritten
6 notes when we briefed them on why we made the
7 decision we made. In 2009 you'll see some of
8 the computations that were actually done in
9 one of the meetings in handwriting calculating
10 the costs and also the set of notes on the
11 field test.

12 We lumped them altogether. I had
13 them put different numbers on them. But I
14 thought it would be useful for you to have
15 them in one place and say, "Okay. Here's all
16 the contemporaneous evidence."

17 JUDGE: Who wrote those notes? Do
18 you know?

19 MR. CARROLL: Yes. There are two
20 sets of them. The notes that are in '06 and
21 '07 are Tennis Channel's notes when we called
22 them and explained to them our cost benefit

1 analysis. And the field check notes which is
2 the last set of notes in the document, those
3 are Jen Gaiski's notes from Comcast
4 documenting when she checked with the regions
5 that I told you about, the four regions, and
6 asked is anybody interested in carriage in the
7 south, east, west and north. And she
8 documented what she was told.

9 JUDGE: Wait a minute. Where are
10 those?

11 MR. CARROLL: If you go through --

12 JUDGE: At the very end?

13 MR. CARROLL: The very end.

14 JUDGE: That said -- Can I give
15 you the number? Comcast No. 130?

16 MR. CARROLL: Exactly right.

17 JUDGE: And who wrote those notes?

18 MR. CARROLL: Jen Gaiski. She'll
19 be a witness here. G-A-I-S-K-I.

20 JUDGE: G-A-I-S-K-I. And Jennifer
21 or?

22 MR. CARROLL: I always call her

1 Jen. Is it -- It's Jennifer.

2 JUDGE: Okay.

3 MR. CARROLL: And these are those
4 notes I told you about where she called people
5 in the south, east, west and north and asked
6 about is there any interest in Tennis Channel.

7 JUDGE: And what is her position
8 with Comcast?

9 MR. CARROLL: She worked for Mr.
10 Bond. She's a direct report to Mr. Bond in
11 the area of the business that is charged
12 essentially charged with discrimination and
13 the area of the business that's charged with
14 not carrying Tennis Channel. They do the
15 deals. Mr. Bond has since changed positions.
16 But at the time she and Mr. Bond were in
17 charge of what's called Content Acquisition,
18 acquiring channels for Comcast Cable.

19 JUDGE: Okay. I hear you.

20 MR. CARROLL: Your Honor, very
21 quickly and I thank you for your patience. I
22 hope this is helpful.

1 JUDGE: Could I ask one question
2 of you?

3 MR. CARROLL: Yes.

4 JUDGE: The young lady standing
5 outside, do you want her to sit down some
6 place? We have seats.

7 PARTICIPANT: I'm fine. Thank
8 you, Your Honor.

9 JUDGE: Yes, madam.

10 MR. CARROLL: In Tab D, I just
11 highlighted a few excerpts from the
12 Commissioners' decision in MASN, the most
13 recent ruling in that case, related to the
14 cost benefit analysis. I've added the
15 highlighting. This is a paragraph from that
16 decision that I think speaks very strongly.

17 JUDGE: That's paragraph 12.
18 Right?

19 MR. CARROLL: Wow. You got me on
20 that. Yes, paragraph 12. It's cited at the
21 bottom.

22 JUDGE: Correct.

1 MR. CARROLL: And I think those
2 words apply the same here with respect to our
3 cost benefit analysis.

4 And then, Your Honor, I took the
5 liberty -- I hope no offense -- of excerpting
6 a few of the paragraphs from your ruling, your
7 preliminary recommended decision in the Wealth
8 TV case, because I thought those were very
9 apropos here as well. The bottom two
10 sentences is the piece I read to you before
11 having to do with the timing that if a channel
12 is launched before another channel even exists
13 there cannot have been discrimination
14 obviously at work at that time.

15 And I found your language
16 describing what "similarly situated" means
17 very helpful here as well. And I think we'll
18 be getting into facts that again relate very
19 directly to the language there.

20 JUDGE: Okay. And so if the
21 Commission had decided there when they made
22 their review of this case maybe this would not

1 be in here. But they didn't finish their
2 review yet.

3 MR. CARROLL: You are quite right.
4 Although fair is fair. Last time I was in
5 front of you in the NFL case. The other side
6 was citing to me for Your Honor the MASN lower
7 court ruling and I was dealing with it as the
8 most recent precedent.

9 I'm not suggesting that Your
10 Honor's words have the full weight of the
11 Commission. I'm just using them as a
12 reference point for a recent decision that I
13 think correctly applies to standards.

14 JUDGE: Okay.

15 MR. CARROLL: And I think at least
16 the burden should be on Tennis Channel to
17 explain if they think they saw some error in
18 this reasoning. Maybe they can articulate
19 what they think it is.

20 I agree with you. The FCC has the
21 final word and they have spoken in the MASN
22 case.

1 JUDGE: They have. Yes.

2 MR. CARROLL: Very quickly --

3 JUDGE: Is that case on appeal by
4 the way?

5 MR. CARROLL: It's been appealed
6 I'm told to the Court of Appeals. Yes.

7 Behind Tab E --

8 JUDGE: I wonder why I'm not
9 surprised at that.

10 MR. CARROLL: Exactly.

11 JUDGE: Okay. Let's go.

12 MR. CARROLL: Tab E, remember I
13 told you that we wouldn't have to argue much
14 about the points I was making about gender,
15 age and the size of the viewerships because
16 Tennis Channel's own words before they knew
17 they were going to have a lawsuit spoke to all
18 these issues.

19 Here are these documents very
20 quickly. The first one behind Tab E, this is
21 from an exhibit that's in the record. These
22 are Tennis Channel's words that I've

1 highlighted.

2 JUDGE: Are these confidential,
3 these words?

4 MR. PHILLIPS: They've been
5 designated confidential.

6 JUDGE: Yes, I see it. Okay.

7 MR. PHILLIPS: Your Honor, I'm not
8 sure what this document -- I think the 2004
9 document. I'd have to go back and look and
10 see whether after all these years it's still
11 confidential.

12 MR. CARROLL: I'm not quoting it
13 public out of the respect for the fact that
14 it's been designated highly confidential.
15 But, Your Honor, here it is for you to see.
16 I would submit that as we get going in the
17 case these words are not going to be highly
18 confidential. There's no numbers in them or
19 anything. But for the opening argument I'm
20 content just to proceed.

21 JUDGE: All right. Go ahead.

22 MR. CARROLL: I mean I couldn't

1 have written better words as a lawyer from my
2 side in this case than Tennis Channel itself
3 wrote in its own documents.

4 JUDGE: Is there any way that we
5 can let this read into the record now? I mean
6 it --

7 MR. PHILLIPS: Your Honor, during
8 a break, I can look back. That's a 2004
9 document. I just want to go back and look at
10 it.

11 JUDGE: All right. Because I mean
12 --

13 MR. PHILLIPS: I understand.
14 We'll certainly do our best to accommodate
15 that.

16 JUDGE: Okay. Thanks. Let's go.

17 MR. CARROLL: Behind Tab F,
18 there's the age group median ranges I was
19 giving you before, Your Honor, on a nice
20 colored chart. And you'll see Golf Channel is
21 over there in the old group of 51 through 56.
22 Tennis Channel is in the middle.

1 Interesting. It's not only a
2 different age group. It's also a very
3 competitive age group because you see on the
4 left side, Your Honor, the margin is capturing
5 the number of channels that you're competing
6 with. And you see the green bar. That age
7 group is very heavily focused with competitive
8 channels.

9 And then you'll see Versus in the
10 36 to 40 group to the left.

11 JUDGE: It's just there's a bar
12 next to the Tennis Channel, but it's not
13 labeled as anything. Is that --

14 MR. CARROLL: Because there's no -
15 - Because they're arguing that Tennis Channel
16 is like Versus and Golf, we've limited this
17 chart to those three. We could add in -- Each
18 of these bars would have -- Well, the green
19 bar would have 30 channels. Do you see the
20 left margin, Your Honor?

21 JUDGE: I do.

22 MR. CARROLL: There would be 30

1 channels that would occupy that space. Tennis
2 Channel is one of the 30 in that space for
3 that age group. In the orange bar next to it,
4 there are some 27 channels there. But that
5 bar does not include Tennis Channel, Versus
6 and Golf and we've not listed them all in.
7 But we could do that if Your Honor would like
8 to see that.

9 JUDGE: I'm curious. Do they have
10 something to do with like hockey or something
11 like that? I mean, are they sports or?

12 MR. CARROLL: No. Actually a lot
13 of these and a lot of the ones that Tennis is
14 right near actually are non-sports channels.
15 There will be some evidence on that you'll see
16 from some of the experts.

17 JUDGE: Then I'm not particularly
18 interested in that.

19 MR. CARROLL: All right.

20 JUDGE: Not at this time anyway.

21 MR. CARROLL: Okay.

22 The next tab -- we're almost

1 finished with the book, Your Honor -- behind
2 G chapters Male Viewership. Now again I'm not
3 saying male viewership is better and with four
4 daughters I wouldn't say that. I'm a fan of
5 women viewership. But this is a case about
6 similarity and differences.

7 And Versus is the No. 1 ranked
8 male viewer channel. Not a surprise when you
9 look at the type of sports and activities that
10 they have on it.

11 Tennis Channel is way over at 28
12 on that bar by comparison. And I would
13 submit, Your Honor, that no matter what an
14 expert wants to try to argue there's no way to
15 argue those are substantially similarly
16 situated. No way.

17 JUDGE: Now wait. You're looking
18 at the green and the red.

19 MR. CARROLL: Yes. Green is
20 always -- Tennis Channel's color is green.

21 JUDGE: Right. And that's .

22 MR. CARROLL: Correct. Percent of

1 males.

2 JUDGE: I'm sorry. The viewership
3 -- Of all the viewership of Tennis Channel,
4 are males.

5 MR. CARROLL: Correct. This is --

6 JUDGE: And 68 percent of Versus
7 are males.

8 MR. CARROLL: That's exactly what
9 this chart is capturing. Because when you're
10 looking at similarly situated one of the
11 things advertisers look at for selling
12 products is where would I get the most men,
13 where would I get the most women, if you had
14 products that were targeted to one or the
15 other.

16 JUDGE: Okay.

17 MR. CARROLL: The page behind this
18 to what says it all this is the actual page
19 from the 2009 offer that Tennis Channel made
20 to us. This is the picture. I mean we didn't
21 do this. This is their promotional piece that
22 they brought to the meeting with us and said,